No. 86-679

In The Supreme Court of the United States

October Term 1986

BOOTH NEWSPAPERS, INC.
Petitioner

v

MIDLAND CIRCUIT JUDGE, DOW CHEMICAL COMPANY, CONSUMERS POWER COMPANY, BECHTEL POWER CORPORATION AND BECHTEL ASSOCIATES
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF MICHIGAN

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

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Booth Newspapers, Inc. replies to the briefs of respondents Consumers Power Company (Consumers) and Bechtel Power Corporation and Bechtel Associates Professional Corporation (Bechtel) in opposition to the Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

In their briefs in opposition, respondents limit their argument to the issue of access to judicial records at trial. This restricted approach is inappropriate. The trial involving Consumers commenced before and has continued after the Michigan Court of Appeals decision to which the Petition for Certiorari is addressed. Proceedings at trial were not raised in

the Petition, nor are they relevant to this Court's evaluation of the appellate decision.

Respondent raises a second issue not discussed in the petition: the "privacy" of the civil proceedings which, they claim, justified circuit court and appellate court denial of access to civil pretrial discovery documents, including discovery materials used to support pretrial motions, without regard to good cause. This issue, likewise, is without merit.

ARGUMENT

1. Respondents' Emphasis Upon The Trial Proceedings Is Misleading And Irrelevant To The Petition

Respondent Consumers implies that all discovery documents relating to the nuclear plant were entered into evidence at trial, where the press had full and complete access. (Consumers Brief at p. 4). Consumers glosses over the fact that the trial has not been completed, having been adjourned for the purpose of settlement negotiations. Should trial resume, the trial judge may rely on the Court of Appeals decision, which holds that public access to the records of pending litigation can be denied until "the conclusion of proceedings on appeal, and the return of the record to the Circuit Court clerk." *Booth Newspapers, Inc. v. Midland Circuit Judge*, 145 Mich. App. 396, 404, 377 N.W.2d 868, 871 (1985). This holding sets a dangerous precedent of denying public access to documents and records at trial. Consumers' assertion that the Michigan Court of Appeals decision has nothing to do with trial documents is unfounded.

If the case is settled by a "business arangement"[1] (Consumers Brief at p. 4), that settlement will crystallize the importance of access to pretrial documents. Materials relating to charges of wrongdoing involving billions of dollars of taxpayers' money will be forever sheltered, even from the arguable scrutiny of a public trial.

Respondents' emphasis on the later trial and the access to trial exhibits that was accorded to the press and the public despite the appellate decision is irrelevant to this Court's review of that decision. At any time, access to judicial records, even at trial, could be denied under the auspices of the appellate decision. It is the appellate ruling which is precedent and which is the subject of the Petition for Certiorari, not anecdotal versions of the trial. For this reason, respondents' allusions to press access at trial are of no moment. This Court has long recognized the phenomenon of a topic being "capable of repetition yet evading review." *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 603 (1982). The Michigan Court of Appeals decision must be viewed in this light.

2. Respondents' Reliance On The "Privacy" Of Civil Litigation Fails To Recognize The Good Cause Requirement For Protective Orders

Throughout their briefs, resondents rely on what they call the "privacy" of depositions and other pretrial documents to support their contention that the trial and appellate courts acted properly in ignoring the requisite good cause standard necessary for entry of protective orders. Bechtel even refers to

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[1] As outlined in the petition, the proposed settlement involves converting a multi-billion dollar nuclear power plant that does not function into a multi-billion dollar gas power plant, all at the expense of Michigan citizens and Consumers' shareholders.

the discovery documents petitioner seeks as "private, non-adjudicative[2] materials." (Bechtel Brief at p. 2). Consumers twice uses the word "outsiders" to allude to the public and the press regarding their interest in the Consumers-Dow litigation.

No litigation is entirely private. There is public cost to all litigation through use of the courthouse, judges and court reporters. All tort litigation revolves around breach of some duty. This concept of duty and breach is a public concept that clarifies societal roles. Public access to all aspects of the litigation produces the "community therapeutic value" referred to in *Press-Enterprise Co. v. Superior Court*, 478 U.S. ____, 92 L. Ed. 2d 1, 13 (1986). It is for this reason that discovery is presumptively open, requiring a showing of good cause to close it. Michigan General Court Rule 306.2 [now superseded by Michigan Court Rule 2.302(C)] required a motion for protective order and a judicial determination of good cause before entering such an order. There would be no reason for such prescription if discovery were already presumptively "private" as respondents contend.

This Court has recognized the presumptive openness of discovery by its holding in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), that a protective order must be accompanied by a showing of good cause. *Id.* at 37. In support of their contention that there is no First Amendment right of access, Consumers cites *United States v. Anderson*, 799 F.2d 1438 (11th Cir. 1986), a case based on an extravagant misreading of *Seattle Times*, that, treading backward, denied press access to *criminal* pretrial materials. Pretrial discovery is presumptively open

[2] The term "non-adjudicative" is particularly incorrect and misleading because, as is often the situation in civil litigation, in this case the parties introduced discovery materials and deposition excerpts in pretrial motions before the trial court. Dow's Motion to Vacate Trial Date, for instance, cited extensively from deposition transcripts subject to the protective orders.

under the federal rules and the Michigan rules and those rules require good cause to close it.

In addition to denying that there is a First Amendment right of access, Consumers also contends that there was good cause for the five protective orders. (Consumers Brief at p. 2). This claim is diametrically opposed to the factual record. Consumers admits that the parties stipulated to entry of the first three protective orders, hardly a compliance with the requisite judicial finding of good cause. *Gulf Oil Co. v. Bernard,* 452 U.S. 89, 102 n.16 (1981). Turning to the fourth protective order, Consumers bolsters petitioners' case by stating that the trial judge held an extensive hearing on the *scope* of those protective order (Consumers Brief at p. 2), not on whether they were properly entered under a good cause standard. The recitation as to the fourth and fifth protective orders, at page 3 of Consumers' Brief, explicitly shows that those orders were *faits accomplis,* a collaboration of the parties and a rubber stamp by the judge.

Even more self-serving is Consumers' thesis that sealing of transcripts is merely a "longstanding practice of the Midland County Circuit Court," supported by an affidavit to that effect from a retired judge. (Consumers Brief at p. 3). Respondent fails to cite any justification for this practice other than tradition. The tradition undoubtedly finds its source in the even more longstanding nonexistence of photocopying equipment, a modern convenience which now makes guarding of the original deposition under seal, lock and key an anachronism.[3]

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[3] See Note. Access to Pretrial Documents Under the First Amendment, 84 Colum. L. Rev. 1813, 1826-27 (1984). Evidence presented by petitioner to the trial court also indicated the tradition arose to protect the court reporter's "chain of possession," to insure against tampering with the transcript.

CONCLUSION

Petitioner has not sought unrestrained access to discovery materials in all cases. However, *Seattle Times* requires at a consitutional minimum a balancing of interests, including First Amendment interests, to substantiate a showing of good cause. 467 U.S. at 37. Bechtel has argued that public access to discovery would increase costs of litigation and have a negative impact on the functioning of the judicial process (Bechtel Brief at p. 9) but has not explained why this would be so.

Consumers states a right of access to criminal pretrial proceedings "foster[s] the integrity of fact-finding and the appearance of fairness, check[s] judicial abuses and provide[s] a cathartic opportunity for the community to observe justice being done." [Consumers Brief at p. 12, quoting from *In Re Reporters Committee for Freedom of the Press*, 773 F.2d 1325, 1336–7 (D.C. Cir. 1985).] Neither respondent voices any legitimate reason for not applying such standards to civil litigation that involves issues of parmount public interest. The Petition for Certiorari should be granted.

Respectfully submitted,

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